United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7290

United States Court of Appeals
FOR THE SECOND CIRCUIT

B

P/S

ACLI INTERNATIONAL, INC.,

Plaintiff-Appellant,

against

S.S. CAMPECHE, her engines, boilers, etc., TRANSPORTACION MARITIMA MEXICANA, S.A., dba MEXICAN LINE,

Defendants-Appellees,

TRANSPORTACION MARITIMA MEXICANA, S.A.,

Defendant and Third-Party Plaintiff-Appellee and Cross-Appellant,

against

PITTSTON STEVEDORING CORPORATION,

Third-Party Defendant-Cross-Appellee.

73 Civ. 1297 HRT

(Caption continued on inside cover)

BRIEF FOR PLAINTIFF-APPELLANT

HILL, RIVKINS, CAREY, LOESBERG & O'BRIEN
Attorneys for Plaintiff-Appellant, ACLI International, Inc.
96 Fulton Street
New York, New York 10038

Of Counsel:
FREDERICK W. MEEKER

ACLI INTERNATIONAL, INC.,

Plaintiff-Appellant,

against

TRANSPORTACION MARITIMA MEXICANA, S.A., dba MEXICAN LINE and SMITH AND JOHNSON (SHIPPING) INC.,

Defendants-Appellees,

TRANSPORTACION MARITIMA MEXICANA, S.A.,

Defendant and Third-Party Plaintiff-Appellee and Cross-Appellant,

against

PITTSTON STEVEDORING CORPORATION,

Third-Party Defendant-Cross-Appellee.

73 Civ. 5341 HRT

On Appeal from the United States District Court,
For the Southern District of New York

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other Authorities:

BRIEF OF PLAINTIFF-APPELLANT

Statement of Issues Presented for Review

1. Whether the court erred in non-suiting the plaintiff for failure of proof of liability on the part of defendant Mexican Line.

2. Whether the court had before it any evidence to support the following conclusions of fact:

A. That the truck carriage of the cargo from the premises of the shipper to the port of loading took four as opposed to two hours and that the carriage took place during daylight hours.

B. That the cargo was stacked "quite high" in open sheds under corrugated iron roofing where there was little circulation of air or where some of the cartons were very close to the "metal roof" under the "blazing sun", or both.

C. That there was no evidence that special instructions were given to the vessel regarding handling and storage save for a legend on the packaging.

D. That the melting point of the cocoa butter in question is in the "30° to 36.3° C. range (86°-97.3°F).

3. Whether the court erred as a matter of law in requiring of plaintiff something in excess of establishing its prima facie case i.e. delivery to the carrier in apparent good order and condition and outturn in bad order and condition.

Statement of the Case

These consolidated actions were brought by plaintiff, Acli International Inc., for damage to various shipments of cocoa butter moving between Coatzacoalcos, Mexico, and the ports of Philadelphia and New York.

Because of the similarity in all the various shipments, the parties stipulated that the question of liability as to all the voyages would be settled by trial of the ten day voyage of the CAMPECHE in July, 1968.

The trial was held before Judge Tyler on December 23, 1974 and on January 16, 1975.

On the first day of trial, counsel for plaintiff called the plaintiff, plaintiff's surveyor, plaintiff's weigher and plaintiff's reconditioner and submitted transcripts of deposition testimony taken in Mexico of the shipper and the defendant's general agent at the port of loading, as well as deposition testimony of the defendant vessel's chief officer.

On the second day of trial, plaintiff's counsel called as witnesses an expert chemist and a mechanical engineer.

Defendant's counsel called as witnesses the chief officer on the voyage in question, the manager of a competing cocoa butter factory, and a customer of that factory.

Third-party defendant's counsel did not call any witnesses at trial.

After trial, Judge Tyler found that the plaintiff must be non-suited for failure of proof of liability on the part of Mexican Line. He further found that "Acli has failed to prove that the damage was due to either improper stowage or any other negligent custody and control of the cargo by Mexican Line and its agent."

After judgment, plaintiff appealed and defendant filed a protective appeal.

At the trial, testimony was introduced on the following points by plaintiff's counsel:

1. The cocoa butter was manufactured at Cardenas, Tabasco, Mexico (275).

2. The cocoa butter was stored at Cardenas in a temperature controlled warehouse at no more than 25°C (77°F) (276).

3. The cocoa butter was trucked from Cardenas after daylight hours, and in good condition (276, 277).

4. The truck time from Cardenas to Coatzacoalcos is two hours (277).

5. The storage warehouse at the pier in Coatzacoalcos was made of concrete (297).

6. The cococa butter was transported to the loading port between July 10 and July 12, 1968 (Plaintiff's Exhibit 22A).

7. The temperature at Coatzacoalcos between July 10 and July 13, 1968 did not exceed 87.8°F (31.0°C) (Plaintiff's Ex. 25).

8. The melting point of cocoa butter is well in excess of 90°F (184).

9. The cocoa butter was stored at the warehouse in Coatzacoalcos no more than 8 cartons high (258, 259).

10. Instructions were received by the vessel's agent from the shipper "not to load to (sic) high in a close place" (254, 255).

11. The CAMPECHE loaded 3,668 cartons of cocoa butter in the # 1 lower hold and 2,732 cartons in the # 4 tween deck (A5).

12. A clean on board bill of lading was issued for the cargo in question on July 13, 1968 (A5).

13. The cargo in the # 4 tween outturned clean (157).

14. The damage which is the subject matter of this action was outturned exclusively from the #1 lower hold (157).

15. The Chief Officer neither received nor carried out any special instructions with regard to the carriage of cocoa butter (163).

16. The average temperature during the period of water carriage of the cargo was 75°F (173).

17. No hold temperature readings were taken of the cargo in the #1 lower hold during the voyage in question (172, 173).

18. No rough weather occurred on the voyage (172).

19. That if the cargo had been stowed in #3 lower hold rather than #1 lower hold, no damage would have occurred (174).

20. A carton of cocoa butter identical to the cartons which outturned damaged, withstood for a period of 10 days a static test with a 1,000 lb. load (equivalent to 20 cartons) superimposed at a temperature of 90°F (195, 196, Plaintiff's Ex. 26).

Summary of Argument

The court below was clearly erroneous in finding the following facts:

1. That the truck carriage from the shipper's plant to the loading dock took four as opposed to two hours.

2. That the truck trips took place after the sun had arisen.

3. That the melting point of cocoa butter was below 90°F.

4. That the cartons, while in warehouse at the loading port were "tiered up quite high under the sheds either in

a position where there was little circulation of air or where some of the cartons were very close to the metal roof under the blazing sun, or both".

5. That no special handling instructions were received by the carrier.

The court below was also clearly erroneous in coming to the following conclusion of law:

1. That plaintiff had the burden of affirmatively proving that the loss was due to the negligence of the defendant.

POINT I

The findings of fact of the Trial Court are either not supported by any evidence or by totally insufficient evidence.

Under Rule 52 of the Federal Rules of Civil Procedure, "Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses".

Clearly, the Court of Appeals has the power to review questions of fact tried before a court without jury when it is apparent that no evidence is on record to support the finding or the weight of the evidence is wholly against such a finding.

See *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 68 S. Ct. 525 (1948).

Furthermore, in a case heard before this court in 1959, it was held that a finding of a Tax Court (which are subject to the same limitations as is a review of decisions of District Judges sitting without a jury) is "clearly erroneous", so that it can be set aside by the Court of Appeals when, though there is evidence to support it, the Court of Appeals on the entire evidence is left with the definite and firm con-

viction that a mistake has been committed. *Casey* v. *Commissioner of Internal Revenue,* 267 F2d 26.

Furthermore, the courts have held in cases where "the dispute is not to the basic facts, but as to what inference (i.e., ultimate fact) should reasonably be derived from the basic facts [the 'clearly erroneous' provision of Rule 52(a) is not applicable]". *Sears, Roebuck & Co.* v. *Johnson,* 219 F2d 590 (CCA 3rd 1955)

In the case at bar the following facts are undisputed:

1. The cargo left the shipper's warehouse in good condition between July 10 and July 12, 1968.

2. The cargo was loaded aboard the vessel at the loading port clean with no exceptions on July 13, 1968.

3. The atmospheric temperature at the loading port did not exceed 87.6° F.

4. The cargo outturned damaged.

The crux of the question at bar is whether there was sufficient evidence to find as a fact that the cocoa butter, loaded into #1 lower hold reached such an advanced degree of melting between July 10 and July 13, 1968, to collapse in stow after being loaded aboard the carry vessel, but not so far advanced as to give any indication to the defendant that the cargo was at all impaired.

It is submitted that the trial court piled negative inference on top of negative inference to reach this conclusion and capped it off by a misconstruction of the plaintiff's burden of proof.

The conclusions of fact based upon these inferences taken by the Trial Court are as follows:

1. That the truck trip from the shipper's premises took four *vice* two hours (A 54, A 55).

Testimony of the shipper is unequivocal that the trip took two hours.

Testimony of the defendant's witness (a resident of Mexico City and competitor of the shipper) was as follows:

"Q. Mr. Espana, you said you were familiar with the route from Cardenas to Coatzacoalcos?

A. Yes.

Q. Do you know how long this takes by truck?

A. I was making this by driving. I think is about three four hours driving a car. Could be six in a truck.

Q. Could it be two hours by truck?

A. I drive very slow, I take four hours." (134)

The trial judge has elected to infer four hours *vice* two in the face of the fact that the shipper dispatched trucks along the route in the regular course of business virtually every day and the competitor lives in a city some 500 miles distant, has never made the route by truck and "drives very slow" (134).

2. That the cargo was "tiered up quite high under the sheds, either in a position where there was little circulation of air or where some of the cartons were very close to the metal roof under the blazing sun or both" (A55).

In two of these three findings i.e. height of tiers, and blazing sun, we find in support no evidence, and in fact evidence to the contrary.

With regard to the height of the tiers the testimony of the carrier agent was as follows:

"Q. Mr. Ruiz, how may boxes high there are stack (sic) now?

A. 8 high.

Q. Is there any reason that they don't stack higher?

A. If they stack higher we have to pay different price, according to the stibadores (sic) prices." (258, 259)

Since the cartons themselves were 7 inches in width, the height of the tier in the warehouse could be no more than 56 inches, less than 5 feet. This would leave approximately 45 feet between the top carton and the ceiling!

With regard to the "blazing sun", the record is void as to the atmospheric conditions at the time of the pier storage, other than air temperatures. Appellees are invited to cite evidence in the record as to the conditions of overcast at the relevant time.

3. The Trial Court found that the truck trips took place after the sun had arisen (A55).

The testimony of the shipper was that the trucks loaded in the early evening and departed the warehouse for the loading port between two and three A.M.

> "Q. Do you send the trucks to Coatzacoalcos about 3 P.M.?
>
> A. No, we start [loading] at 5 P.M. and they leave about 3 A.M.
>
> Q. Now, if the shipments were in the daytime will be dangerous?
>
> A. Yes, only when we have cool weather is O.K." (295)

The testimony of the carrier's agent at Coatzacoalcos was that he saw truck arriving from the shipper at any time of day (262, 263) and would appear at first blush to impeach the shipper. But, since the shipper did state that during cool weather they ship during daylight, and the agent did not restrict his response to a particular time of year or weather condition, the shipper's testimony stands as uncontradicted except by the Trial Court.

4. The Trial Court found as a fact that the carrier had received no special instructions concerning the care and custody of the cargo (A56).

The testimony of the agent Ruiz was as follows:

> "Q. Mr. Ruiz, were any special instructions received from Industrializadora de Tabasco concerning special handling of this cargo.
>
> A. Just not to load to (sic) high in a close space. That is right, nothing." (254, 255)

The response, although somewhat cryptic, is certainly clear enough.

5. The Court found that the melting point of cocoa butter was between 30° and 36.3°C (86°-97.34°F) (A55).

The testimony of the plaintiff's insurance manager, a man who was in the cocoa butter importing business for 20 odd years, was that the melting point was about 95°F (19, 20).

The deposition testimony of the carrying vessel's Chief Officer (the officer with the primary responsibility for the care and custody of cargo) was that he did not know the melting point of cocoa butter (nor did he know the temperature of the hold in which it was stowed) (320).

The testimony of the shipper's competitor was that the melting point was between 30° and 33°C and, if improperly manufactured, 27°C (132, 133).

The plaintiff's expert testified as follows:

> "Q. Given that carton, for instance, of this nature, my carton, were exposed to an ambient air temperature of, say, 90 degrees, and given the fact that it is in a relatively stable polymorphic state, would you expect that to melt? . . .
>
> A. Would I expect the cocoa butter to melt?
>
> Q. Yes.
>
> A. At 90 degrees?
>
> Q. Yes.
>
> A. Well, let me amplify that a little bit. When a substance is melted it's in the completely liquid form.

When the substance is solid it's a completely solid form. At 90 degrees I don't think it would be completely liquid, no. . . . I think it might be starting to soften or might be on the slightly . . . probably at 90 degrees it would not . . . it would just . . . it would not be soft at all, maybe. I think that's below the normal softening point even of cocoa butter.

I would say it would have to be a few degrees higher than that before it would start to soften, and a good deal higher than that before it would be liquid.

Q. When you say a good deal higher in order to be a liquid, what do you mean by a good deal?

A. I would think it should be up to about 98 degrees and kept at that temperature before the mass in that box would completely liquify.

Q. When you say at that temperature, do you have any rough approximation of how long?

A. Until the temperature throughout is equalized. Don't forget, when you have a carton like that, the outside will be at say 98 degrees, the inside could still be 10 degrees lower. Because the heat transmission of a substance like that is very slow, and by the time the center of the carton melted might take hours or days, I don't know, at least." (183-185)

And further:

"A. . . . Cocoa butter is uniquely suited [as a base for suppositories] because it melts at body temperature . . .

The Court: Refresh me, Mr. Kahan, at body temperature what are we talking about measurably? A. 98.6." (188, 189)

On cross-examination, defendant's counsel attempted to establish the authority of the U.S. Pharmacopoeia.

"Q. Would you agree with the statement that is contained on page 338 of the Pharmacopoeia, melting

point, 30 bromo oil melts between 30 degrees and 35 degrees centigrade?

A. That is U.S.P. Grade cocoa butter.

Q. And what is 30 degrees centigrade?

A. 88.

Q. May I show you the page that I referred to, Mr. Kahan, and ask you whether or not the information pertaining to cocoa butter restricts itself to U.S.P. grade?

A. By the mere fact that it is in this book it is restricted to U.S.P. grade." (193)

Finally, plaintiff called as a witness a mechanical engineer who had run a test on an identical carton to the one at bar.

It was established that a test of a carton of cocoa butter had been performed where the carton was exposed to ambient atmosphere of 90°F. with a thousand pound load superimposed thereon (equivalent to 20 cartons overstowing) for a period of 10 days (the length of the voyage in question) without side support of any sort.

The results of that test was that there was only slight staining to one corner of the box, which was attributed to some of the product between the interior and exterior wrapping (195-197). The court is invited to compare these results with over one foot of cocoa butter on the floor of #1 lower hold (326).

In sum, the District Court found as facts at least five points that are either grossly against the weight of the evidence (melting point and length of truck carriage) or which are undisputedly contrary to the testimony (warehouse storage, time of truck carriage, lack of handling instructions).

From the facts that it found, it was almost inevitable for the court to find the basic fact that the cocoa butter had melted prior to receipt by the carrier.

The fact that the carrier, as sole custodian of the cargo from the time it was last seen clean until it was discharged destroyed, could not testify as to temperatures in the hold, did not know the properties of cocoa butter, admitted that had it been stowed elsewhere it would not have been damaged, and carried identical product elsewhere in the vessel without incident are either dismissed as irrelevant or rejected as baseless!

POINT II

The court erred as a matter of law when it found that plaintiff had not met its burden of showing good order and condition upon delivery to the carrier.

Plaintiff has shown the following:

1. The cocoa butter left the shipper's warehouse in good order and condition.

2. That the melting point of cocoa butter was well in excess of 90°F. and more in the 95-98°F. range.

3. That the cargo could have been stowed at the port of loading for a maximum of only three days (July 11-13).

4. To attain a liquid state, the cargo would have to be exposed to 98° heat for "days".

5. The height of stow at the warehouse at Coatzacoalcos was at most 5 feet.

6. The maximum temperature at the port of loading was 87.8°F.

7. No exceptions were taken at the port of loading by the vessel.

8. The vessel agents had received instructions not to load too high and to stow in a cool place.

9. The cocoa butter outturned severely damaged.

10. Had the cargo been stowed in #3 hold, no damage would have occurred.

Plaintiff contends that the above numbered statements are inescapable and form a *prima facie* case. To require more of a consignee is patently unreasonable and would eviscerate the letter and spirit of the Carriage of Goods by Sea Act.

Defendant has testified that it received the cargo in what it considered good order and condition and delivered it in damaged condition. As to the properties of the cargo and condition of the cargo space, it claims ignorance, other than to admit that stowage elsewhere in the vessel would have avoided the damage.

In order to find against the plaintiff, the Trial Court had to find either that the warehouse at the loading port was in excess of 98 degrees F. or that the melting point of cocoa butter was significantly below 87.8°F., or both.

It is submitted that on the first question, no evidence tended to support the finding, and on the second the clear and convincing evidence supported the 98°F. melting point. All defendant's testimony as to the temperature of the warehouse at Coatzacoalcos was in the nautre of observations that "it sure gets hot in the summer". Hardly competent evidence.

"The rule that 'insufficient evidence' is in the eyes of the law, no evidence; applies even in the [N.Y.] Court of Appeals, and therefore that it is not necessary, in order that the court may reverse a judgment on the ground that there is no evidence to support it, that there should be literally no evidence at all, but only that there should be none which ought reasonably to satisfy a court or jury that the fact sought to be proved is established". (11 Carmody Wait 2d 71:162; *Matter of Case,* 214 N.Y. 199, 203-204.)

Here the evidence points only to conclusions favoring the plaintiff and there is no evidentiary basis for the trial court's conclusions, or more precisely, no evidence which ought reasonably to have satisfied the court that the facts sought to be proved were established.

Consequently, the conclusion that plaintiff had not established a *prima facie* case was an error of law and is clearly reversible.

POINT II!

The Trial Court erred as a matter of law when it required of the plaintiff consignee to shoulder the burden of affirmatively proving that the damage was either due to improper stowage or other negligent control and custody of the cargo by Mexican Line and its agent.

The court had before it no evidence that the hold temperatures were excessive. It also had before it no evidence that they were not excessive.

It had evidence that the temperatures of the outside atmosphere were in the 75° range.

It had no evidence as to the condition or temperatures of the drums of lemon oil understowing the cocoa butter.

It is submitted that the court therefore inferred that assuming the hold temperatures were at or near the atmospheric temperatures, and that the drums were cool, then the damage must have been caused by a pre-shipment condition even though the clear and convincing evidence in the record indicates that the temperatures at the port of loading were well below the melting point of the cargo.

It is further submitted that an indication of this "leap of faith" is reinforced by the court's statement, "Although plaintiff proved discharge of 1400 cartons of this shipment

in a stained, soft and contaminated condition, *ACLI has failed to prove that the damage was due to either improper stowage or any other negligent custody and control of the cargo by the Mexican Line and its agents*" (Emphasis added).

It is clear that once the cargo plaintiff in a COGSA action establishes a *prima facie* case i.e. delivery to the carrier in apparent good order and condition, and outturn damaged, the burden of persuasion shifts to the carrier to prove freedom from negligence. *Schnell* v. *SS Vallescura et al.*, 1934 AMC 1573.

> "Prima facie evidence is, of course, like all evidence, susceptible to rebuttal: but unrebutted, it remains sufficient as a matter of law to establish the ultimate proposition it purports to prove. *It goes without saying that such evidence can only be overcome by contrary proof, and not by mere surmise and speculation*". (Emphasis added) *Azad B. Karabagui et al.* v. *SS Shickshinny*, 1954 AMC 1616 (SDNY 1954)

In the case at bar, the Trial Court surmised that the temperature of #1 lower hold was below the melting point of the cocoa butter. It then surmised that therefore, it had to be melted prior to receipt by the carrier. It then constructed a scenario at the port of loading which would account for the melting and shifted the burden of persuasion to the plaintiff to affirmatively prove negligent carriage by the defendant.

The case at bar should leave this court with the "definite and firm conviction that a mistake has been committed". *Casey* v. *Commissioner, supra.*

CONCLUSION

Appellant prays that the judgment below be reversed as clearly erroneous and that the court award judgment to plaintiff in the amount of $24,198.38.

Respectfully submitted,

HILL, RIVKINS, CAREY, LOESBERG
& O'BRIEN
Attorneys for Appellant,
ACLI International, Inc.
96 Fulton Street
New York, New York 10038

Due and timely service of Two copies
of the within Brief is hereby
admitted this 15th day of August 1975

.....
Attorney for